IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Misc.No.2934-M of 2007

Date of Decision: September 19, 2007

S.K.Bhowmik

...Petitioner

VERSUS

S.K.Arora & another

...Respondents

CORAM: HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.R.S.Cheema, Senior Advocate with
Mr.J.S.Mehndiratta, Advocate.

Mr.R.S.Rai, Senior Advocate with
Mr.Gautam Dutt, Advocate.

Mr.M.S.Bhowmick, Advocate,
for the petitioner.

Mr.R.K.Sharma, Advocate,
for respondent No.1.

*****

RANJIT SINGH, J.

Invoking the amended provisions of Section 202 Cr.P.C., this petition for quashing the complaint and summoning order is filed

by the petitioner with the submission that it is obligatory upon the Magistrate to enquire into the case before summoning an accused residing beyond his jurisdiction. Noticing the contentions raised on behalf of the petitioner that no enquiry, as envisaged under Section 202 Cr.P.C., was held before summoning the petitioner, notice of motion in this case was issued.

During the course of hearing, submissions are made by the counsel representing the parties. There does not appear to be much differences on the basic issue arising for consideration due to this amendment incorporated in Section 202 Cr.P.C. Mostly concerned with the debate on the legal issue so raised, the counsel did not make any submission before the court if the impugned order is revisable or the fact that the enquiry in this case was held by the Magistrate before summoning the petitioner or not. There was otherwise a consensus between the counsel appearing for the petitioner and contesting respondent that enquiry would now be mandatory in a case where an accused person is found to be residing beyond the jurisdiction of a Magistrate dealing with the case. There was some debate about the nature of this enquiry. There may not have been any requirement to go into the scope of the amendment introduced and the effect thereof in view of the consensus between the counsel, yet it may be appropriate to go into this aspect as the issue was indeed debated before the court.

To appreciate the submissions made, it would be essential to have a peep into the history of this provision. Section 202 Cr.P.C. makes a provision for postponement of an issue on process and has undergone modifications from time to time. Before its

amendment, which came into force on 23.6.2006, Section 202 Cr.P.C. was a substantial reproduction of old Section 202 with certain modifications. Under the old Section, the Magistrate was required to record reasons in writing if he wanted to postpone the issue of process, which requirement, was done away with on the basis of recommendation made by the Law Commission. While recommending the deletion of this requirement, the Law Commission felt that no real purpose would be served by any expression of judicial opinion at that stage. Accordingly, words “for reason to be recorded in writing” occurring in sub-section (1) of Section 202 were deleted. Originally, this section permitted a Magistrate to direct an enquiry or investigation by any Magistrate subordinate to him when he received any complaint. This again was deleted on the recommendation of the Law Commission, which observed that case was ultimately to be decided by the Magistrate himself and if the evidence is to be finally weighed by a particular Magistrate, it is proper that it should be heard by the same Magistrate. The division of responsibility, which was implied in this section, was considered wholly undesirable. Another change, which had come in this section, is the replacement of words “a scrutiny, a truth or falsehood of the complaint” as existing in the old sub-section with the words “deciding whether or not there is sufficient ground for proceeding”. It was felt that the former words, noted here-in-before, did not represent the real purpose of preliminary enquiry. Truth or falsehood of a complaint is not open to be decided at the stage of summoning an accused. It was also felt that real purpose of enquiry is to ascertain whether the grounds exist for proceeding or not. Even Clause (a) in the proviso to

sub-section (1) was also a newly added provision. Sub-section (1) of Section 202 Cr.P.C. before recent amendment reads as under:-

> "202. Postponement of issue of process.-(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding."

The recent amendment in the year 2006 now makes the sub-section read as under:-

> "202. Postponement of issue of process.-(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding".
>
> The words introduced by amendment as highlighted are:-
>
> "and shall, in a case where the accused is residing at a

place beyond the area in which he exercises his jurisdiction."

It would be noticeable that this amendment has not brought in any change so far as the nature of enquiry, required to be held under the section is concerned. It can further be noticed that holding of enquiry seems to have been made obligatory in a case where accused person is residing at a place beyond the area in which the Magistrate exercises jurisdiction thus seems to be the only change introduced by way of this amendment. It may be noticeable that prior to this amendment, holding of enquiry before issuing a process, was in the discretion of a Magistrate, which would continue to be so unless an accused person is the one who resides beyond the territorial jurisdiction exercised by the Magistrate. In ***Boya Lakshmanna v. Boyachinna Narasappa and another, 1976 Cri.L.J.127,*** it was held that it is optional for the Magistrate to hold enquiry and he can issue process direct as well. Ofcourse a Magistrate is not required to issue process against an accused as a matter of course and can hold an enquiry, if after perusing the statement of the complainant and the witnesses, he is not satisfied that a case for summoning is made out and wishes to further enquire into the matter. He would then follow the procedure indicated in Section 202(2) Cr.P.C. The statement of the complainant and the witness, referred to above, would have come before him under Section 200 Cr.P.C. This option of issuing process direct, which was available or is available with the Magistrate in other cases, would no more be available in cases where this amendment would be applicable. The purpose behind this amendment can well be noticed

from the draft accompanying the amendment. This is as follows:-

> "Clause 19.-False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

The words "if he thinks fit" occurring before postpone the issue of process give clear indication about the option before a Magistrate to issue process or postpone the issue of the same in his discretion without holding an enquiry. This discretion now would not be available with the Magistrate in cases where amendment is made applicable. In short, the Magistrate would now be under obligation to enquire into a case either himself or direct investigation to find out whether or not there was sufficient ground for proceeding against an accused where he resides at a place beyond his area of jurisdiction. This is the only change introduced in the provision. The nature of enquiry envisaged under this section ofcourse has not undergone any change. It has been held that the nature of enquiry would vary with the circumstances of each case and the enquiry as contemplated certainly is such which should not be exhaustive. In ***Kewal Krishan v. Suraj Bhan and another, AIR 1980 Supreme***

Court 1780, the Hon'ble Supreme Court observed:-

> “All that he has to see is whether or not there is “sufficient ground for proceeding” against the accused. At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial court. The standard to be adopted by the Magistrate in scrutinising the evidence is not the same as the stage of framing charges. Even at the state of framing charges the truth, veracity and effect of the evidence which the complainant produces or proposes to adduce at the trial, is not to be meticulously judged. The standard of proof and judgment, which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of framing charges. A fortiori, at the stage of Sections 202/204, if there is prima facie evidence in support of the allegations in the complaint relating to a case exclusively triable by the Court of Session, that will be a sufficient ground for issuing process to the accused and committing them for trial to the Court of Session.”

It was further observed that to ascertain whether or not the evidence so collected would disclose sufficient grounds for proceeding is lower than the one to be adopted at the stage of framing charges. In ***Smt.Nagawwa v. Veeranna Shivalingappa Konjalgi and others, AIR 1976 Supreme Court 1947,*** it is observed as under:-

> “The scope of the inquiry under Section 202 is extremely limited- only to the ascertainment of the truth or falsehood of the allegations made in the complaint-(i) on the

materials placed by the complainant before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In fact, in proceedings under Section 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not."

It can, thus, be said that degree of formality of the proceedings and the width and depth of the enquiry are entirely in the discretion of the Magistrate. It was also held that this provision is enabling and not obligatory. Though it was observed that it is not necessary that a Magistrate should hold an enquiry under this section in every case and it is only when he "thinks fit" that he may do so, but it was viewed that it would be advisable that an enquiry be held where the complainant is not speaking from his own knowledge. Even before amendment, there were some cases where such enquiry was held obligatory. Under Section 10 of the Child Marriage Restraint Act of 1929, such enquiry is obligatory and the failure to do was held to vitiate the whole trial. In this regard, reference may be made to ***State of Gujarat v. Patel Jivraj Khimji and others, 1966 Gujarat Law Reporter 935.*** This may be sufficient to appreciate the parameters in regard to the requirement of an enquiry now made obligatory in cases where an accused resides beyond the jurisdiction of a Magistrate. It would, thus, be proper to hold that in a case of

person residing beyond jurisdiction of a Magistrate, if the process is issued without holding enquiry, it may vitiate the whole trial.

Since this effect of the amendment was not seriously disputed by the counsel appearing for the contesting respondent, I do not consider the need to go into the significance of word “may” or “shall” as argued by Mr.R.S.Cheema, learned Senior counsel appearing for the petitioner. To be fair to him, he has urged that the use of word “may” and “shall” in the same provision would cover two different situations and this provision is discretionary in one situation and mandatory in another. This would not appear to be in much dispute. Mr.Cheema appears to be justified in submitting that use of expression “may” conferring discretion upon the Magistrate with respect to one facts situation and that of “shall” in connection with another situation would give an indication of the fact that legislature had intended to make this provision mandatory in nature. The notice on the clause of amendment, as referred to above, and the use of word “shall” in the amended provision, in my view, does not leave much scope of debate in regard to the nature of this amendment introduced, making it to be obligatory. In regard to the implication of word “shall”, Mr.Cheema has referred to M/s ***Rubber House v. M/s Excellsior Needle Industries Pvt.Ltd., AIR 1989 SC 1160.*** As per this, the word “shall” in its ordinary import is said to be obligatory. In ***Raza Buland Sugar Co.Ltd. Rampur v. Municipal Board, Rampur, AIR 1965 SC 895,*** the Hon'ble Supreme Court held that whether use of word is mandatory or merely directory cannot be resolved by laying down any general rule and would depend upon the facts of each case and for that purpose the object of the statute in making

the provision is the determining factor. In ***State of U.P. v. Babu Ram Upadhya, AIR 1961 SC 751,*** it is held that when a statute uses the word “shall”, prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute.

Viewed in this background, it would be safe to say that the manner in which this amendment has been introduced and the wording thereof, when read in the light of objects behind the same, would make it clear that the legislature intended this provision to be made as obligatory/mandatory in nature. Thus, it would be proper to say that holding of an enquiry and the other options available to the Magistrate in this regard under Section 202 Cr.P.C. would be obligatory where it is found that person is residing beyond his jurisdiction. In this case, the present petitioner is not residing within the jurisdiction exercised by Judicial Magistrate Ist Class, Faridabad. Thus, it was obligatory for the Magistrate to hold enquiry envisaged under Section 202 Cr.P.C. before issuing process.

To ascertain if any enquiry was held or not, a mention to the facts, in brief, would be essential. Petitioner is a Managing Director of M/s Haldia Petrochemicals Limited with the address as 1-Auckland Place, Kolkata. Respondent No.1 has filed a complaint dated 11.5.2004 (Annexure P-1), against him before Judicial Magistrate Ist Class, Faridabad under Sections 323/452/504/506 IPC, which has led to his summoning vide order dated 14.10.2006 (Annexure P-2). The petitioner is a Managing Director of M/s Haldia Petrochemicals Limited (“HPL” for short) and is working with this concern since 10.8.2001. He was appointed as Chief Executive on

30.4.2002 and has been inducted in the Board of Directors w.e.f. 29.3.2005. HPL has appointed various agents across the country to sell its products. Such agents are to ensure payment to the HPL against the sale of the products to the customers. One IPF Vikram India Ltd.Panchkula, Haryana was appointed as an agent during the year 2000. During the year 2001-2002, IPF supplied certain products of HPL to another company named Himachal Filament Pvt. Ltd. Sirmour (Himachal Pradesh) ("HFPL" for short). HFPL had issued a cheque amounting to Rs.37,08,115/- through its agent to HPL. This cheque was dishonoured. HPL issued power of attorney in favour of IPF to recover this price of goods supplied by HPFL as an agent of HPL to HFPL. An application was also given by IPF to the Inspector General of Police, Chandigarh for recovery of dues from HFPL. On 5.8.2002, HFPL was made to pay a sum of Rs.31.83 lacs before Lok Adalat, U.T.Chandigarh and had agreed to pay a sum of Rs.two lacs on monthly basis. HFPL did not honour this order passed by Lok Adalat leading to registration of an FIR on 15.11.2002 against respondent No.1. He was accordingly arrested. Respondent No.1 filed a civil suit for defamation at Faridabad against the petitioner and one Shri Siddharth Anand of IPF. This suit is stated to have been dismissed in default on 6.2.2006 and application for its restoration is pending. It is disclosed that by suppressing these material facts, respondent No.1 filed the present complaint in the court of Judicial Magistrate, Faridabad on 11.5.2004 alleging that the petitioner alongwith two unknown persons had come to his office for discussion in connection with the suit and had abused him, caught him from the collar and gave fist blows. Respondent No.1 appeared as CW-1 in

support of the complaint and further produced one Akash Wadhawan as CW-2. On the basis of this evidence, the Magistrate has summoned the petitioner vide its order dated 14.10.2006, which is under challenge in the present petition.

The primary submission made by the counsel for the petitioner is that petitioner is a resident of Kolkata and is, thus, residing beyond the area in which Judicial Magistrate at Faridabad exercises jurisdiction and hence could have been summoned only by holding an enquiry into the case as envisaged under Section 202 Cr.P.C. As already noticed above, the holding of enquiry by a Magistrate or in other manners of holding enquiry/investigation as he thinks fit, would be obligatory and mandatory in the present case since the petitioner is residing in an area beyond the jurisdiction of the Magistrate concerned. That being so, it is required to be seen if the process is issued to the petitioner by holding an enquiry as required under Section 202 Cr.P.C. or not.

While making submission, Mr.Cheema points out that the complaint in this case was made on 11.5.2004. The evidence of two witnesses, one of which is complainant, was recorded on 27.10.2004 and the order summoning the petitioner is dated 14.10.2006. From this, learned counsel would contend that Magistrate obviously was not conscious about the amendment made in Section 202 Cr.P.C. As already noted, this amendment has come into force on 23.6.2006, much after filing of the complaint and recording of evidence, but before issuing of the process. It is urged that process in this case has been issued by the Magistrate without taking into consideration the amendment in Section 202 Cr.P.C. It is urged that if the Magistrate

was conscious of this amendment at the time of issuing process, he would have done so after holding enquiry which is now obligatory. It is stated that the Magistrate has issued process in this case without holding enquiry envisaged under Section 202 Cr.P.C. It is reasonable to say that Magistrate has not taken note of this amendment if he had issued process without holding an enquiry. If one was to find that this process is issued after holding enquiry, then perhaps it cannot be urged that the process is issued without taking into consideration the amendment introduced in the section. As already noted, the process in this case is issued after recording the evidence of two witnesses. This according to Mr.Cheema is in terms of Section 200 Cr.P.C. This Section (200 Cr.P.C.) provides for examination of the complainants and the witnesses present, if any, by a Magistrate while taking cognizance. Section 202 Cr.P.C. is contained in Chapter XV, which deals with the provisions relating to the steps which a Magistrate has to take while and after taking cognizance of any offence on a complaint. Once the Magistrate takes cognizance of offence, then he has to follow the procedure prescribed under Section 202(1) Cr.P.C. Examination of the complainant and witnesses, if any, under Section 200 Cr.P.C. is done while or for taking cognizance. The Magistrate can then either hold enquiry or direct investigation to be made either by police officer or any other person. This is to help the Magistrate to decide if there is sufficient ground for him to proceed further. This seems to be emerging from the wording of Section 202 Cr.P.C. Thus, after taking cognizance, the stage of issuing a process would come, which under Section 202 Cr.P.C. can be postponed by the Magistrate if he thinks fit to hold an

enquiry or direct an investigation to see if there are sufficient grounds for proceeding or not. This enquiry or investigation now is made obligatory/mandatory in a case where accused is residing at a place beyond the area in which he exercises jurisdiction. In other words, it would mean that such enquiry/investigation is mandatory even when he has taken cognizance after examining the complainant or his witnesses under Section 200 Cr.P.C. The examination of the complainant and witnesses as envisaged under Section 200 Cr.P.C. can not be equated or be a substitute for the enquiry/investigation required under Section 202 Cr.P.C. Prior to amendment, it was in the discretion of the Magistrate to hold enquiry or have the case investigated under Section 202 Cr.P.C., which now is made mandatory in the case of person residing at a place beyond the area of his jurisdiction. The nature of this enquiry or investigation continues to be the same as was prior to coming into force of the amendment in question.

The order summoning the petitioner is annexed on record. Process is issued without holding enquiry or getting the complaint investigated in any manner. Reference has already been made in regard to the nature of enquiry, required to be held under this section to see if prima facie case is made out or not. In ***Nagawwa's case (supra),*** the Hon'ble Supreme Court has observed that the enquiry envisaged under this section is extremely limited. This is for the limited purpose to find out whether a prima-facie case for issue of process is made out. As already noticed in this case, this is required to be decided purely from the point of view of the complainant without at all adverting to any defence that the accused

may have. Similarly in ***Kewal Krishan's case (supra),*** the Hon'ble Supreme Court observed that the Magistrate at this stage is not to weigh the evidence meticulously as if he was a trial court. Rather in this case the Hon'ble Supreme Court has observed the limits of Magistrate's discretion and infirmity, if he meticulously appreciates the evidence. The Hon'ble Supreme Court declined to interfere by saying that such would only be an irregularity and not illegality leading to any miscarriage of justice. Thus, where the Magistrate was to meticulously appreciate the evidence, it may lead to lapse on his part in overstepping the discretion available to him under this section. In other words, it can be stated that the Magistrate at the time of issuing process is not to weigh the evidence as already noted, width and depth of this enquiry are entirely in the discretion of the Magistrate, though such an enquiry may vary with the circumstances of each case, but it is not required to be exhaustive (see ***Kewal Krishan's case, supra)***.

Process is issued in this case only on the basis of examination of the complainant and CW-2. This is obviously under Section 200 Cr.P.C. It was done much prior to the date of amendment of Section 202 Cr.P.C. It is seen that no enquiry/investigation is held as is required under Section 202 Cr.P.C. The quashing of the summoning order is sought mainly on the ground that the Magistrate has not held enquiry, which is obligatory. If the Magistrate had considered the amended Section 202 Cr.P.C., he was bound to hold enquiry/investigation thereunder before issuing process, though this court would not have any power to interfere or to substitute its own discretion over that of a Magistrate. Where

Magistrate is seen to have exercised his discretion judicially, the same may not call for any interference. The defence of the accused is not the factor, which is required to be taken into consideration to call for any interference in the order. Even the irregularity in the procedure under this section, which does not result in miscarriage of justice, may not call for any interference by a court. Whether a prima-facie case is made out from the evidence recorded or not, would be a matter within the discretion of the Magistrate. In fact some inadequacy of the enquiry will also not call for any interference. But enquiry or investigation in case where the accused resides beyond his jurisdiction cannot now be wished away being mandatory. In this case, no enquiry or investigation have been held and process, as such, is issued in violation of the mandatory requirement of Section 202 Cr.P.C. and cannot be sustained. Thus, impugned order is accordingly set aside and case is sent back to the Magistrate to examine fresh by adhering to the requirement of Section 202 Cr.P.C.

The argument of Mr.Cheema based on the ground that it would sound improbable for a person to come and visit the office of the petitioner to behave in a manner as alleged, need not be gone into as the case is going back to the Magistrate to hold enquiry/investigation etc. The complaint otherwise can not be quashed on the ground that summoning was done without holding enquiry or investigation as envisaged under Section 202 Cr.P.C. It may not otherwise be open to judge the correctness or otherwise of the allegations made in the complaint in a petition under Section 482 Cr.P.C. Defence plea can also not be considered while exercising revisional jurisdiction or inherent powers. See ***S.Nihal Singh and***

others v. Arjan Das, New Delhi, 1983 Cri.L.J.777.

As a result, the present petition is partly accepted. The impugned order summoning the petitioner is set-aside. The case would go back to the Magistrate for deciding the case for issuing process afresh by following the mandatory provisions of law under Section 202 Cr.P.C.

September 19, 2007 (RANJIT SINGH)
ramesh JUDGE